Supreme Court, U.S.
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No. 00-1626

IN THE

Supreme Court of the United States

INDUSTRIVARDEN SERVICE AB,

Petitioner,

v.

CAROL CLUNE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did Petitioner have minimum contacts with the State of Missouri such that the maintenance of the suit in Missouri does not offend traditional notions of fair play and substantial justice.

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STATEMENT OF THE CASE

In February, 1996, Joseph Clune was working at a building site in Kansas City, Missouri when he fell to his death from a construction hoist through an unenclosed area on top of the work platform. The hoist was manufactured by Linden-Alimak AB ("Linden-Alimak"), a Swedish corporation that designed and manufactured construction hoists and other lifts. Industrivarden Service AB ("Industrivarden") is one of two successor companies of Linden-Alimak. Industrivarden is a shell corporation that has no employees and does not manufacture or sell equipment. The company now exists to handle the liabilities of Linden-Alimak. Linden-Alimak sold the accident hoist F.O.B. Swedish port to Esco Corporation ("Esco") in 1972. At the time, Esco maintained an office in Oregon and imported the hoist into the United States via Seattle, Washington.

Linden-Alimak made construction hoists, including the Clune hoist, specifically for the United States market. Linden-Alimak published sales brochures, instruction manuals and signage in English specifically for the United States market. The sales brochures show hoists in operation in the United States and stress compliance with American regulatory standards. Those construction hoists had signage with the Alimak name prominently displayed.

The only way a customer in the United States could acquire a Linden-Alimak hoist was through the company's exclusive United States distributors and later its wholly-owned subsidiary. If the customer directly contacted Linden-Alimak in Sweden, he would be referred to the American distribution system in the United States.

Beginning in 1960, Linden-Alimak had agreements with two exclusive distributors, Esco and B.M. Heede ("Heede"), to market and sell its products in the United States. In 1978, Linden-Alimak purchased Heede and it became a wholly-owned subsidiary. The name was changed from Heede to Linden-Alimak Inc. Linden-Alimak Inc.'s purpose was to sell and market Linden-Alimak products in the United States. As the exclusive sales arm of Linden-Alimak in the United States it accomplished its purpose through a network of regional sales offices. Missouri was covered by the Chicago, Illinois regional sales office.

Linden-Alimak's wholly-owned subsidiary was licensed to do business, had a registered agent, filed annual registrations and obtained certificates of authority to transact business in Missouri. Some of the members of the Board of Directors of Linden-Alimak were also board members of the wholly-owned American subsidiary. Directors and officers of Linden-Alimak filed reports in Missouri listing themselves, along with others, as the directors of the American subsidiary. Management of the American subsidiary went to Sweden to report to Linden-Alimak concerning needed product improvement and anticipated sales in the United States.

Linden-Alimak's exclusive distributors and later wholly-owned subsidiary sent salesmen into Missouri on a regular basis for the purpose of selling Linden-Alimak's products and providing advice. Between 1960 and 1986, over 700 of the company's construction hoists were sold in the United States. Twenty to forty of those construction hoists were sold in Missouri during that time period. Linden-Alimak had actual knowledge that its products were being marketed and sold in Missouri.

Industrivarden, as successor corporation to Linden-Alimak, purchased product liability insurance to cover its liabilities for construction hoists sold in the United States. Industrivarden also engages in a continuing duty to warn concerning the safety of hoists located in the United States and acknowledges an obligation to make, if necessary, safety retrofits on these hoists.

Based on the above facts, the Eighth Circuit Court of Appeals found Linden-Alimak had purposely directed its products to the United States and Missouri through the distribution system it established in this country. Therefore, there were sufficient minimum contacts with Missouri to satisfy the due process standards set by the Supreme Court.

REASONS FOR DENYING THE WRIT

Constitutional "due process requires only that in order to subject a defendant to a judgment in the forum . . . he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Company v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). This Court, cutting to the heart of the matter, has held that due process is satisfied if the "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297-98, 100 S. Ct. 580, 62 L. Ed. 2d 490 (1980). This Court has further held that "marketing the product through a distributor who has agreed to serve as the sales agent in the forum state" is the type of conduct that indicates an intent or purpose to serve the market in the forum state. *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).

1. The Eighth Circuit was Correct in Its Application of the Stream of Commerce Theory of Jurisdiction.

In *Asahi*, the United States Supreme Court stated that although the placement of a product into the stream of commerce, without more, is not an act of a defendant purposefully directed toward the forum state, "additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum state . . . ." *Asahi*, 480 U.S. at 112. Justice O'Connor gave some examples of the type of conduct by a defendant that may indicate an intent or purpose to serve the market in the forum state: ". . . designing the product for the market in the forum state, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state." *Id.*

The Eighth Circuit in this case found it extremely significant that Linden-Alimak created the distribution system that brought the construction hoists to the United States and Missouri. "[W]ithout the existence of its subsidiaries, Industrivarden would not be able to distribute its product in the United States. This connection between the foreign manufacturer and the resident subsidiary represents more than simply placing a product into the stream of commerce." *Clune v. Alimak AB*, 233 F.3d 538, 547 (8th Cir. 2000) (App. A at 19a).

As the majority opinion found, the facts of this case demonstrated Linden-Alimak's purposeful availment of the privilege of doing business in Missouri and the hoist's location in Missouri was not mere happenstance.

> Linden-Alimak AB/Alimak AB designed its construction hoist for the United States market. The company had exclusive distribution agreements with United States distributors. The Swedish parent's logo was displayed on products that were sold in the United States. Linden-Alimak AB/Alimak AB also conducted training seminars in the United States for technicians employed by Alimak, Inc. who serviced hoists that were sold by this subsidiary. Of the 700 construction hoists that were sold in the United States by the company's distributors, between 20 and 40 ended up in Missouri. This fact alone makes it difficult for us to characterize the hoist's location in Missouri as random, attenuated or fortuitous. *See Burger King*, 471 U.S. at 475. Additionally, the Swedish parent provided sales brochures and instruction manuals to its distributors for use in promoting and servicing its products in the United States. Members of the Swedish parent's board of directors also served as directors of its subsidiary. Any of these facts taken alone, might fall short of purposeful availment, however, when taken together they show that Linden-Alimak AB/Alimak AB engaged in a series of activities that were designed to generate profits to the parent from its subsidiaries' sales across the United States.

Clune, 233 F.3d at 543-44 (App. A at 10a and 11a).

. . .

> The facts show that Linden-Alimak AB/Alimak AB purposefully directed its products to the United States through the distribution system it set up in this country. The company knew that by virtue of this system, its construction hoist entered the Missouri and other Midwest markets. Linden-Alimak AB/Alimak AB's creation of this system that brought hoists to Missouri established sufficient minimum contacts with the forum to satisfy the due process standards set by the Supreme Court and followed by this circuit.

Id. at 544 (App. A. at 13a).

Petitioner complains that the Eighth Circuit was incorrect in relying on the stream of commerce theory because stream of commerce is a type of specific jurisdiction. Petitioner argues that because the actual elevator involved in this accident was not originally sold by the Petitioner in Missouri, under the "substantive relevance" test the litigation does not "arise out of or relate to" the activities of the Petitioner in Missouri, and therefore cannot qualify as specific jurisdiction. *See* Petition for Writ of Certiorari at 18.[1]

1. Much of Petitioner's brief contains general statements from Law Review articles concerning various tests to be used to determine specific versus general jurisdiction and how to interpret the phrase "arising out of or related to". Interestingly, these authorities would appear to have little difficulty in finding that jurisdiction is appropriate in this case. *See, e.g.*, Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 662 (1988) ("[I]t is the fact that this accident occurred within the forum coupled with the similarity between the manufacturer's conduct in the forum and the conduct underlying the plaintiff's cause of action, that makes exercising jurisdiction over this claim particularly reasonable. . . . The fact that the car was not actually sold within the state is, in this context, fortuitous").

Contrary to Petitioner's argument, the Eighth Circuit made it clear that the facts of this case demonstrate that the hoist's location in Missouri was not simply random, attenuated or fortuitous. *Clune*, 233 F.3d at 544 (App. A. at 13a). Linden-Alimak "did more than simply set a product adrift in the international stream of commerce. The record shows Linden-Alimak AB/Alimak AB created the distribution system that brought the hoist to Missouri." *Id.* at 543 (App. A. at 8a).

Petitioner argues that "[c]ourts have consistently held that general personal jurisdiction analysis applies where the injurious product was sold outside the forum and brought into the forum by third persons not controlled by the defendants." *See* Petition for Writ of Certiorari at 18. Petitioner cites only one case for this proposition, *Terzano v. PFC*, 986 F. Supp. 706 (D.P.R 1997).[2] *Terzano* is easily distinguishable from the facts in this case. In *Terzano* the defendant manufacturer's luggage was made in New York, purchased in New Jersey, and caused an accident in Florida. The lawsuit was brought in Puerto Rico, where the plaintiff lived but where there was no evidence that the manufacturer sold this type of luggage. Contrast the facts in *Terzano* to this case where the accident occurred in the forum state and where Linden-Alimak already had a substantial and ongoing presence selling this exact type of construction hoist in Missouri through a distribution network it had established.

The fact that the sale of a product occurred initially outside the forum state has not been a serious detriment for courts to find personal jurisdiction over a foreign manufacturer. In *World-Wide Volkswagen*,

2. The First Circuit had already rejected the stream of commerce theory as a means to establish personal jurisdiction. *Terzano*, 986 F. Supp. at 712.

444 U.S. at 297-99, the Supreme Court noted in dicta that there was undisputed personal jurisdiction over a foreign manufacturer in the state of injury despite the fact that the product was purchased in another state.

In *Barone v. Rich Brothers Interstate Display Fireworks Company*, 25 F.3d 610 (8th Cir.), *cert. denied*, 513 U.S. 948 (1994), the manufacturer sold its fireworks to a distributor located in South Dakota. The injury to the plaintiff ultimately occurred in Nebraska. The Eighth Circuit upheld the assertion of personal jurisdiction over the manufacturer in Nebraska.

In *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943 (8th Cir.), *cert. denied*, 525 U.S. 1018 (1998), the manufacturer sold the product to a company in England. The product was then sold three more times before it caused an injury to the plaintiff in Iowa. The Eighth Circuit found the foreign manufacturer subject to jurisdiction in Iowa.

Other courts agree with the Supreme Court and the Eighth Circuit that specific jurisdiction applies despite the fact the product was initially sold outside the forum state.

> The Court finds misplaced Extec's argument that the court lacks specific jurisdiction because Bartow's employer purchased the machine in Pennsylvania and had it shipped to Connecticut. So long as the defendant has sufficient minimum contacts with the forum jurisdiction, it is irrelevant that the individual product causing the injury was purchased in another state.

Bartow v. Extec Screens & Crushers, Ltd., 53 F. Supp. 2d 518, 527, note 2 (D. Mass. 1999). *See also Vermeulen v. Renault, USA, Inc.*, 985 F.2d 1534, 1537, 1550 (11th Cir.

1993) (personal jurisdiction properly asserted over foreign manufacturer in state of accident despite purchase of car by plaintiff from brother outside the accident state); *Giotis v. Appollo of the Ozarks*, 800 F.2d 660, 668 (7th Cir. 1986) (personal jurisdiction exists where product sold outside forum and brought to forum by third party), *cert. denied*, 479 U.S. 1092 (1987); *Benn v. Linden Crane Co.*, 370 F. Supp. 1269, 1277 (E.D. Pa. 1973) (It is "constitutionally irrelevant whether the particular crane in issue was one of the 19 cranes sold within the state in assessing the propriety of *in personam* jurisdiction").

In this case, plaintiffs' cause of action accrued when Joseph Clune fell to his death in Missouri from a construction hoist designed and manufactured by the defendant. Having contracted with its distributor to sell hoists in Missouri, having sent brochures into Missouri, having solicited sales in Missouri, having sold 20 to 40 hoists in Missouri, having acknowledged a continuing duty to warn and to safety retrofit hoists in Missouri, having manufactured a defective hoist that caused the death of Joseph Clune in Missouri, and having committed a tort in Missouri, there is no question that a direct relationship exists between the Clunes' wrongful death action and the defendant's contacts with Missouri.[3]

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3. We are not persuaded by Industrivarden's argument that it was unaware of what happened to its products after they left the Swedish port. . . . If we were to conclude that despite its distribution system, Linden-Alimak AB/Alimak AB did not intend its products to flow into Missouri, we would be bound to the conclusion that the company did not intend its products to flow into *any* of the United States.

Clune, 233 F.3d at 545 (App. A at 12a) (emphasis in original).

2. The Eighth Circuit Correctly Found that Defendant is also Subject to General Jurisdiction.

Petitioner argues that the Eighth Circuit majority did not find contacts arising to the level of "continuous and systematic" with Missouri. *See* Petition for Writ of Certiorari at 19. This is simply not true. The majority opinion found that the record demonstrated "evidence of continuous transactions between Linden-Alimak AB and its United States distributors." *Clune*, 233 F.3d at 545, note 9 (App. A at 13a-14a). In addition, the court found:

> Linden-Alimak AB/Alimak AB's activities cannot be characterized as amounting to "nothing more than place its products in the stream of commerce." *Falkirk*, 906 F.2d at 376. Contrary to the defendant in *Falkirk*, who was totally without information about the ultimate destination of its product, Linden-Alimak AB/Alimak AB, at minimum, had constructive knowledge that its construction hoists would end up in Missouri. The parent knew that by 1986, 20 to 40 hoists were sold into the state. Also, the intermingling of directors and officers between Linden-Alimak AB/Alimak AB and Alimak, Inc. suggests that the parent was aware of its subsidiary's activities. *See, e.g., Iota Management Corp. v. Boulevard Investment Co.*, 731 S.W.2d 399, 410 (Mo. Ct. App. 1987) (corporation is charged with knowledge of its officers and agents).

Clune, 233 F.3d at 545, note 9 (App. A at 14a).

The concurring opinion also found sufficient facts to support general jurisdiction.

> The District Court ignored evidence that suggests that Industrivarden exercised control over its subsidiaries' marketing and sales decisions. Industrivarden produced sales brochures which were distributed to residents and consumers in Missouri by its distributors and subsidiaries. At least three members of the subsidiary's board of directors were also directors of the foreign manufacturer. Pursuant to Missouri law, Mo. Rev. Stat. § 351.310 (1986), these directors of the subsidiary "controlled and managed" the business of the subsidiary. These directors made no effort to exclude Missouri from its United States sales. At least two of the directors of the subsidiary were also officers of the foreign manufacturer. Courts have found that to be an important factor in determining whether there are sufficient minimum contacts. *See Hawes v. Honda Motor Co., Ltd.*, 738 F. Supp. 1247, 1251 (E.D. Ark. 1990). Under Missouri law, a corporation is charged with the knowledge of its officers and agents. *Iota Mgmt. Corp. v. Boulevard Inv. Co.*, 731 S.W.2d 399, 410 (Mo. App. 1987). Consequently, the foreign manufacturer had knowledge, through its officers and directors, of all of its subsidiary's contacts, sales, and marketing.

Id. at 547 (App. A at 18a).

The defendant sold its hoists in the United States and Missouri through its distributors from 1960 to 1978 and then through its subsidiary from 1978 to 1988. The defendant

produced sales brochures that were distributed to consumers in Missouri by its distributors and subsidiaries. The subsidiaries held certificates of authority to conduct business in Missouri, employed sales representatives to sell Linden-Alimak's product in Missouri, and the parent company and its subsidiary shared some common directors and officers. These acts clearly satisfy the continuous and systematic requirement.

Petitioner argues that even if defendant's contacts with Missouri were "continuous and systematic," general jurisdiction is not proper since the contacts did not occur during the appropriate time frame. Petitioner argues that the relevant time period to determine jurisdictional contacts must be reasonably close in time to the filing of the lawsuit. Although acknowledging 7 years would be reasonable petitioner argues 10 years is too long. *See* Petition for Writ of Certiorari at 21.

In 1988, Linden-Alimak became a shell corporation. At that point, it no longer manufactured hoists, but several hundred of its construction hoists hd already been delivered to the United States and subsequently distributed, directly and indirectly, throughout the entire country. To say it can no longer be held responsible in those states where it marketed its defective hoists 9 years earlier (as opposed to 7) makes no sense. In addition, Industrivarden still has contacts with the State of Missouri, and still owes a duty to the people in Missouri who use its defective hoists. By contract, Industrivarden assumed Linden-Alimak's liability for the defective hoists and maintains insurance to cover these liabilities. Industrivarden recognizes, and has in

fact engaged in, a continuing duty to warn concerning the safety of these hoists and acknowledges an obligation to make safety retrofits if necessary.[4]

CONCLUSION

The Eighth Circuit was correct in finding that Petitioner had minimum contacts with the State of Missouri such that maintenance of the suit in Missouri does not offend traditional notions of fair play and substantial justice. Respondents therefore respectfully request the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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4. The majority opinion held that Linden-Alimak AB "was present" in Missouri from the time the crane entered Missouri until the time the product ceased to exist in the state. Because the crane must have been present at the time Joseph Clune fell from it the timing of the contacts was proper for personal jurisdiction purposes." *Clune*, 233 F.3d at 544, note 8 (App. A at 10).